

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	No. 05-CV-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S MOTION TO STAY THE
JANUARY 16, 2008 OPINION AND ORDER [DKT #1463]
PENDING A RULING ON THE STATE'S OBJECTIONS**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), respectfully requests that the January 16, 2008 Opinion and Order [DKT #1463] be stayed pending a ruling on the State's Objections. In support of its Motion, the State states as follows:

1. On January 16, 2008, Magistrate Judge Joyner entered an Order (1) holding, contrary to the weight of authority, that the state law of attorney-client privilege applies in a case such as this one involving federal question jurisdiction, (2) requiring the State to revise its privilege logs in such a fashion that would, as a practical matter, require the revelation of information itself privileged or protected, and (3) holding that Peterson Farms had established a "special need" for documents for which the State has claimed work product protection, while not only making no provision for an individualized document-by-document showing of "substantial need" for the State's fact work product, but also making no provision for protection against disclosure of the State's opinion work product.

2. The State timely moved for reconsideration of the Order on the ground that the Order was clearly erroneous and contrary to law. *See* DKT #1486.

3. Magistrate Judge Joyner denied reconsideration. *See* DKT #1629.

4. The State has now timely filed Objections to the Order. *See* DKT # 1659.

5. While Magistrate Judge Joyner's Reconsideration Order extended the compliance deadlines under the Order from March 7, 2008 to April 4, 2008, *see* DKT #1629, this new deadline is prior to the completion of the briefing cycle on the State's Objections. *See* LCvR 7.2(e).

6. Because this Order would require the disclosure of privileged and protected information prior to a resolution of the State's Objections, the State now moves to stay the Order [DKT #1463] pending a ruling on these Objections.

7. As explained in *United States v. Rx Depot, Inc.*, 297 F.Supp.2d 1306, 1308 (N.D. Okla. 2003):

When considering a stay pending appeal, the Court must address the following factors: (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay is not granted; (3) the absence of harm to opposing parties if the stay is granted; and (4) any risk of harm to the public interest. "With respect to the four stay factors, where the moving party has established that the three 'harm' factors tip decidedly in its favor, the 'probability of success' requirement is somewhat relaxed."

(Citations omitted.)

8. For the reasons set forth in its Objections, *see* DKT # 1659, the State submits it has a strong likelihood of success on appeal.

9. With respect to the threat of irreparable harm if the stay is not granted, the D.C. Circuit has stated: "the general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged documents to an adverse party is clear

enough." *United States v. Philip Morris, Inc.*, 314 F.3d 612, 622 (D.C. Cir. 2003) (granting stay pending appeal); *see also In re Qwest Communications International, Inc.*, 450 F.3d 1179, 1183 (10th Cir. 2006) ("In *Barclaysamerican*, this court held that '[i]n most cases disclosure makes meaningful review impossible because after disclosure whatever privilege attaches would be worthless.' 746 F.2d at 655 (quotations omitted)") (mandamus action); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992) ("Because of the sensitivity surrounding the attorney-client privilege, care must be taken that, following any determination that an exception applies, the matters covered by the exception be kept under seal or appropriate court-imposed privacy procedures until all avenues of appeal are exhausted") (mandamus action). Given that there is no way to effectively unring the bell once disclosure of its privileged and protected information has occurred, the State will plainly suffer irreparable injury if disclosure of this information is required prior to exhaustion of its appellate rights.

10. With respect to the absence of harm to opposing parties if the stay is granted, "[a] mere assertion of delay does not constitute substantial harm." *See Philip Morris, Inc.*, 314 F.3d at 622. Under the present Amended Scheduling Order, discovery does not end until March 2, 2009. *See* DKT # 1659. Accordingly, Peterson Farms will suffer no prejudice if the Order is stayed while the State pursues its Objections.

10. Finally, with respect to the risk of harm to the public interest, it is clear that "the attorney-client privilege is an 'institutionally significant status or relationship' with deep roots in our nation's adversary system. As such, the privilege advances 'broader public interests in the observance of law and administration of justice.'" *See Philip Morris, Inc.*, 314 F.3d at 622 (citations omitted); *see also In re Grand Jury Subpoenas*, 144 F.3d 653, 659 (10th Cir. 1998) ("The importance and sanctity of the attorney-client privilege is well established"). Allowing the

State to defend its claims of attorney-client privilege and work product protection serves these public interests.¹

11. Plainly, the State has established that the three "harm" factors tip decidedly in its favor. Additionally, the State, in its Objections, has established a strong "probability of success" (even though under the circumstances here the requirement is somewhat relaxed). Accordingly, the stay should issue.

12. The State has conferred with counsel for Peterson Farms on this matter. Peterson Farms objects to a stay of the January 16, 2008 Opinion and Order [DKT #1463] pending a ruling on the State's Objections.

WHEREFORE, premises considered, the State's Motion should be granted.

Respectfully Submitted,

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¹ Indeed, whether the state law of attorney-client privilege or the federal law of attorney-client privilege applies in cases involving federal question jurisdiction, whether privilege logs that would, as a practical matter, require the revelation of information itself privileged or protected can be required, whether a party can be required to turn over fact work product where there has been no individualized document-by-document showing of "substantial need" for the State's fact work product, and whether a party can be required to disclose opinion work product are all issues of considerable public interest.

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